A **PEMBANGUNAN CAHAYA TULIN SDN BHD & ORS**

v.

CITIBANK BHD

B COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
SURIYADI HALIM OMAR JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-03-30-2007]
C 26 FEBRUARY 2008

CIVIL PROCEDURE: *Judgments and orders - Amendment of order - Whether present panel of Court of Appeal had jurisdiction to amend an order made by differently constituted panel of Court of Appeal - Whether* D *application to amend misconceived - Rules of the High Court 1980, O. 42 r. 8*

CIVIL PROCEDURE: *Jurisdiction - Court - Whether present panel of Court of Appeal had jurisdiction to amend an order made by differently constituted panel of Court of Appeal - Whether application to amend* E *misconceived - Rules of the High Court 1980, O. 42 r. 8*

This was an application by the respondent *vide* notice of motion seeking the court's leave to amend an order dated 2 July 2007 made by a differently constituted panel of the Court of Appeal. F The amendment which the respondent wanted to make was to insert the ground upon which the earlier Court of Appeal panel had allowed the appeal, which was that the default judgment in question was an irregular judgment. The issue requiring ascertainment was whether this panel had the jurisdiction to settle G an order allegedly to reflect the true order pronounced by a differently constituted panel.

Held (dismissing the application)
Per Zaleha Zahari JCA delivering the majority judgment of H **the court:**

(1) The terms of the sealed order that had been issued did in fact reflect the pronouncement made by the panel of the Court of Appeal on the date in question. Thus, notwithstanding the fact there was a common member between that earlier panel I and that of this panel *ie*, Suriyadi Halim Omar JCA, the respondent's attempt to seek an amendment by way of notice of motion – to insert the words in the proposed amendment –

was misconceived. A differently constituted panel of Court of Appeal judges would not be in a position to know the actual pronouncement of the earlier panel as to the reason why an appeal had been allowed unless it had been expressly recorded. In the absence of an express recording to that effect, it was not open to this panel to grant an order in terms of the application. (paras 5 & 6)

Per Suriyadi Halim Omar JCA (dissenting):

(1) In the circumstances of the case, O. 42 r. 8 of the Rules of the High Court 1980 had not been complied with. The 'perfected order' of 2 July 2007 ought to be set aside and the matter resolved by the Registrar. By such an order, not only would the relevant statutory requirements be complied with, it would put to rest any real fear of embellishment or interference by a subsequent panel. In the presence of the Registrar, parties could discuss the matter at hand comprehensively to their satisfaction. *Parasuraman Kuppan v. Sazali Md Akhir & Anor* (refd). (paras 12 & 13)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah permohonan responden melalui notis usul memohon kebenaran mahkamah untuk meminda perintah bertarikh 2 Julai 2007 yang dibuat oleh satu panel Mahkamah Rayuan yang lain. Pindaan bermaksud untuk memasukkkan alasan penghakiman Mahkamah Rayuan yang terdahulu apabila membenarkan rayuan, iaitu bahawa penghakiman ingkar yang berkaitan adalah satu penghakiman yang tidak teratur. Isu yang perlu dijawab adalah sama ada panel semasa berbidangkuasa untuk meminda perintah yang dibuat oleh satu panel lain mahkamah ini, supaya perintah yang hendak dipinda itu mencerminkan perintah sebenar yang diisytiharkan.

Diputuskan (menolak permohonan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman majoriti mahkamah:

(1) Terma-terma perintah termeterai yang dikeluarkan menunjukkan bahawa ia sememangnya mencerminkan perisytiharan yang dibuat oleh panel Mahkamah Rayuan pada tarikh berkenaan. Oleh itu, walaupun salah seorang dari ahli panel yang menyidangi panel tersebut, iaitu Suriyadi Halim Omar HMR,

juga menyidangi panel semasa di sini, percubaan responden meminda melalui notis usul – iaitu dengan memasukkan perkataan-perkataan ke dalam pindaan yang dicadangkan – adalah tersasul. Suatu panel hakim-hakim Mahkamah Rayuan tidak akan mengetahui perisytiharan sebenar yang dibuat oleh panel yang lain mengenai sebab-sebab mengapa sesuatu rayuan itu dibenarkan, kecuali jika keputusan itu direkodkan dengan jelas. Dalam ketiadaan rekod yang jelas sedemikian, adalah tidak terbuka bagi panel ini membuat perintah seperti yang dipohon.

Oleh Suriyadi Halim Omar HMR (menentang):

(1) Dalam halkeadaan kes, A. 42 k. 8 Kaedah-kaedah Mahkamah Tinggi 1980 telah tidak dipatuhi. 'Perintah disempurnakan' bertarikh 2 Julai 2007 harus diketepikan dan halperkara harus diselesaikan oleh pendaftar. Dengan perintah ini, bukan sahaja kehendak-kehendak statutori relevan dapat dipenuhi, tetapi kebimbangan tentang tokok tambah atau campurtangan oleh panel yang kemudian dapat dielakkan. Di hadapan pendaftar, pihak-pihak boleh berbincang mengenai halperkara yang berbangkit dengan terperinci dan secara yang memuaskan hati mereka masing-masing. *Parasuraman Kuppan v. Sazali Md Akhir & Anor* (dirujuk).

Case(s) referred to:
Parasuraman Kuppan v. Sazali Md Akhir & Anor [1999] 4 CLJ 1 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 42 r. 8

For the appellants - Malik Imtiaz Sarwar (Arthur Wang Ming Way & Aishah Fadin Baharudin with him); M/s Arthur Wang, Lian & Assoc
For the respondent - CW Teo (YM Cheong with him); M/s Khaw & Partners

[Appeal from High Court, Kuala Lumpur; Suit No: D6-22-1016-2005]

Reported by Suresh Nathan

JUDGMENT

Zaleha Zahari JCA:

[1] The respondent's application *vide* notice of motion filed on 7 November 2007 (encl. (20a)) was dismissed with costs on 29 January 2008 by majority. I was of the view that encl. (20a) should be dismissed for the following reasons:

[2] By encl. (20a) the respondent sought the court's leave to amend an order made by a differently constituted panel of a Court of Appeal, ie, that dated 2 July 2007, in terms as set out in Annexure A of the application. The amendment which the respondent wanted to make was to insert the ground upon which that earlier Court of Appeal panel had allowed the appeal, ie, by inserting the following:

> hanya atas alasan bahawa penghakiman ingkar kehadiran yang dimasukkan terhadap Perayu/Defendan pada 18 haribulan Ogos 2005 yang memihak Responden adalah satu penghakiman yang tidak teratur.

[3] The question in issue here is whether this panel has the jurisdiction to settle an order allegedly to reflect the true order pronounced by a differently constituted panel?

[4] The procedure to be adopted by parties in settling an order according to the Rules is this: Where a party in whose favour an order is given is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor, if any, of the other party who shall within two days of the receipt thereof, return such copy with his signed consent or any required amendments. Should the solicitors concerned be unable to agree upon the draft, any one of them may obtain an appointment before the Registrar (in this case the Registrar of the Court of Appeal), of which notice shall be given to the other, to settle the terms of the order. In respect of an order made by the Court of Appeal, any party may require the matter in dispute to be referred to the presiding judge of the Court of Appeal which heard the appeal to settle the terms of the order.

[5] My understanding from the feedback given by the registrar based on the record in the court file is that the prescribed procedure had in fact been observed. The terms of the sealed order that had been issued did in fact reflect the pronouncement made by the panel of the Court of Appeal on the date in question.

[6] Thus, notwithstanding the fact that there is a common member between that earlier panel and that of this panel (ie, Datuk Suriyadi bin Halim Omar, HMR), I am of the view that the respondent counsel's attempt to seek an amendment by way of notice of motion to insert the words in the proposed amendment

A is misconceived. A differently constituted panel of Court of Appeal judges would not be in a position to know the actual pronouncement of the earlier panel as to the reason why an appeal had been allowed unless it had been expressly recorded. In the absence of an express recording to that effect, it was not open for this panel
B to grant an order in terms of the application.

[7] I accordingly directed that the application in encl. (20a) be dismissed with costs.

C **[8]** My brother Justice Sulong Matjeraie has read this judgment in draft and has concurred with the contents therein.

Suriyadi Halim Omar JCA:

[9] On 29 January 2008, the panel had heard encl. 20a, a
D motion filed by the respondent for an order that the order of the Court of Appeal dated 2 July 2007, be amended in the manner indicated in the proposed amended order. By majority decision that application was dismissed. I had dissented and had opined that the 'perfected order' be revisited by the senior assistant
E registrar, to streamline it in accordance with the requirements of procedural law, and in the course of it resolve any dissatisfactions.

Before supplying the reasons for my dissenting view, it would not be inappropriate, if I were to reproduce the antecedents of the
F case that eventually led to my view. On 2 July 2007 a differently constituted panel had initially heard the matter and had thereafter meted down certain orders. By coincidence I was also one of the panelists that issued the impugned order. It must also be emphasized that the issue of recusal on my part did not arise, as
G parties had raised no objection to my presence, nor did I find any valid reason for my unnecessary withdrawal. In a gist, this panel had allowed the appeal and thereupon set aside the default judgment under appeal, only on the ground that the default judgment was an irregular judgment.

H **[10]** On the same day, and that was 2 July 2007, the process of preparing the draft was initiated, with the respondent's solicitor preparing and serving the draft order on the appellant's solicitors. Counter proposals took place between them, before the latter forwarded the draft order to the deputy registrar of the Court of
I Appeal. Despite the existence of strong objections and views held by parties, the Registry of the Court of Appeal, faultlessly had

returned to the appellant's solicitor one sealed order dated 2 July 2007 and one certified copy of the said order. I say faultlessly, as the registry had remained ignorant of the objections; for want of disclosure by parties in the light of no appointments being held with the registrar to settle the terms. It was admitted by both parties that they never met the registrar to resolve the matter.

[11] Naturally when the respondent's solicitors received the perfected order it promptly objected to the order hence this application to amend it.

[12] I had held the view that in the circumstances of the case O. 42 r. 8 of the Rules of the High Court 1980 had not been complied with. It reads:

> **8 Preparation of judgment or order (O. 42 r. 8)(1)**
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> (1) Where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor (if any) of the other party who shall within 2 days of the receipt thereof, or within such further time as may in any case be allowed by the Registrar, return such copy with his signed consent or any required amendments thereto.
>
> (2) When the solicitor omits to return the copy of the draft within the time prescribed, he shall be deemed to have consented to the terms thereof.
>
> (3) In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar, of which notice shall be given to the other, to settle the terms of the judgment or order.
>
> (4) Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in dispute to be referred to the Judge for his determination.
>
> (5) Where the other party has no solicitor, the draft shall be submitted to the Registrar.

[13] In relation to the above provision, Haidar JCA in *Parasuraman Kuppan v. Sazali Md Akhir & Anor* [1999] 4 CLJ 1 in clear terms had said:

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> Counsel for both parties should have sought an appointment with the judge (in this case the presiding judge) for the dispute in respect of the draft order to be determined. Counsel for the respondent should have taken the initiative as it was he who first prepared the draft order knowing fully well of the disagreement as to the terms of his draft order when En Francis Nathar sent his own draft order to him. **It was not for the registrar to resolve the dispute in their absence** (see O. 42 r. 8(3) and (4) of RHC). (emphasis added)

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C **[14]** It was based on the above reasoning that I had decided that the 'perfected order' be set aside and the matter resolved by the registrar. By such an order, not only will the relevant statutory requirements be complied with, but it will put to rest any real fear of embellishment or interference by a subsequent panel. In the D presence of the registrar, parties could discuss the matter at hand comprehensively, to the satisfaction of all parties.

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